Supreme Court, U.S.
FILED
FEB 10 2003
OFFICE OF THE CLERK

No. 02-878

In the Supreme Court of the United States

VILLA MARIA NURSING AND REHABILITATION CENTER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that it lacked jurisdiction to review the National Labor Relations Board's order in this case insofar as the Board directed that a new election be held among petitioner's employees.

2. Whether substantial evidence supports the Board's finding that petitioner committed unfair labor practices during the union's organizing campaign.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-2a, 3a-4a) are not published in the *Federal Reporter*, but the judgment is noted at 49 Fed. Appx. 289 (Table). The decision and order of the National Labor Relations Board (Pet. App. 5a-19a), and the decision of the administrative law judge (Pet. App. 20a-54a), are reported at 335 N.L.R.B. No. 99.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2002. The petition for a writ of certiorari was filed on December 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a rehabilitation hospital and related health-care facilities in North Miami, Florida. Pet. App. 21a. Service Master Company (Service Master) provides petitioner with housekeeping and laundry services. *Ibid.* In January 1996, the Union[1] began an organizing campaign among workers at petitioner's premises and, on April 22, 1996, filed a representation petition with the National Labor Relations Board (Board) seeking an election. *Id.* at 22a, 46a. On May 31, 1996, Region 12 of the Board conducted separate elections in two bargaining units, one comprised of petitioner's employees and the other comprised of Service Master's employees who worked at petitioner's premises. The Union lost both elections. *Id.* at 7a, 46a-47a. Subsequently, the Union filed election objections and unfair labor practice charges with the Board. *Id.* at 7a, 20a n.1, 47a.

2. On August 30, 1996, acting on the Union's unfair labor practice charges, the Board's General Counsel issued a complaint alleging that petitioner and Service Master had violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), during the organizing campaign. Pet. App. 20a & n.1.[2] The Union's election objections in the representation proceeding were premised on essentially the same conduct alleged in the General Counsel's unfair labor practice

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[1] UNITE! Union of Needletrades, Industrial and Textile Employees, AFL-CIO.

[2] Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, among which is the right "to form, join, or assist labor organizations," 29 U.S.C. 157.

complaint. *Id.* at 7a, 47a. The representation and unfair labor practice proceedings were therefore consolidated before an administrative law judge (ALJ). *Id.* at 7a, 20a.

After a hearing, the ALJ found that petitioner had committed multiple violations of Section 8(a)(1) during the Union's organizing campaign. Pet. App. 20a-45a, 50a-54a. Among other things, the ALJ found that: (i) in May 1996, the month of the election, additional security guards hired by petitioner engaged in unlawful surveillance of employees who spoke with union representatives and accepted union literature (*id.* at 37a-39a); (ii) two or three weeks before the election, a labor consultant retained by petitioner threatened an employee that petitioner would reduce employees' vacations and holidays if the Union won the election (*id.* at 44a-45a); and (iii) petitioner announced a new casual dress policy about two weeks before the election and implemented the policy on the day of the election to encourage employees to vote against the Union (*id.* at 41a).[3] The ALJ found that Service Master did not violate the Act and dismissed the complaint as to it. *Id.* at 8a n.4, 25a-27a, 53a.

The ALJ then turned to the Union's election objections. Pet. App. 46a-50a. Initially, the ALJ found that the Union's election objections document, styled "Objections to Conduct Affecting Results of Election,"

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[3] The ALJ further found that: (i) shortly after the union organizing campaign began, petitioner's engineering supervisor attended a union meeting at a local hotel to "spy" on employee union activity (Pet. App. 22a, 24a); and (ii) about two months before the election, petitioner distributed "satisfaction surveys" to solicit and resolve employee grievances, and began an essay contest with cash awards, in order to encourage employees to vote against the Union (*id.* at 39a-40a, 42a).

raised objections only to the conduct of Service Master, not petitioner. *Id.* at 47a-48a. The ALJ concluded that those objections lacked merit because Service Master had not violated the Act or engaged in other objectionable conduct during the organizing campaign. *Ibid.*

The ALJ ruled in the alternative, however, that if the Board were to construe the Union's document as raising objections to petitioner's actions in addition to Service Master's actions, the three Section 8(a)(1) violations committed by petitioner that are described above "constituted conduct which interfered with the election, requiring the scheduling of a new election for the Villa Maria [*i.e.*, petitioner's] unit." Pet. App. 48a.

3. Petitioner filed exceptions to the ALJ's decision with the Board, and the Union filed cross-exceptions. Pet. App. 5a. The Board (with one member dissenting in part) rejected petitioner's exceptions and affirmed the ALJ's unfair labor practice findings under Section 8(a)(1). *Id.* at 5a-6a & nn.1-2. To remedy those violations, the Board entered a cease and desist order and directed petitioner to post a notice. *Id.* at 9a, 51a-52a.

In its cross-exceptions, the Union challenged the ALJ's finding that it did not file election objections against petitioner. Pet. App. 8a & n.4; see *id.* at 11a. The Board unanimously sustained the Union's cross-exceptions and reversed in part the ALJ's rulings on the Union's election objections. *Id.* at 7a-9a. The Board found that the Union's election objections were "sufficient to raise substantial and material issues concerning [petitioner's] conduct." *Id.* at 9a. The Board explained that, despite "instances of arguably inartful or mistaken grammar," the Union named both petitioner and Service Master as "employers" in the caption of its objections, timely served its objections on petitioner, and alleged objectionable conduct that "cor-

responded directly" to the unfair labor practice allegations in the General Counsel's complaint against petitioner. *Id.* at 7a, 8a. The Board further noted that "all the issues were fully litigated in the consolidated hearing" before the ALJ. *Id.* at 8a-9a.

On the merits, the Board affirmed the ALJ's alternative ruling that certain of petitioner's unfair labor practices constituted objectionable conduct that "require[d] setting aside the election and directing a new election for the Villa Maria unit." Pet. App. 9a. The Board therefore severed "the representation issue with respect to employees in the Villa Maria unit * * * from the rest of the case," and remanded to the Regional Director "to conduct a new election when she deems the circumstances permit the free choice of bargaining representative." *Ibid.*

4. The Board filed an application in the court of appeals for enforcement of its order, and petitioner filed a cross-petition for review. Pet. App. 3a-4a.

a. The court of appeals, acting *sua sponte*, directed the parties to brief the question whether the court possessed jurisdiction to review the Board's order insofar as the Board had directed a new election among petitioner's employees. See Pet. 6. Following briefing on the question, the court issued an order agreeing with the Board that it lacked jurisdiction over petitioner's appeal to the extent that petitioner challenged "the Board's direction to conduct a new election for certain employees." Pet. App. 4a. The court further concluded (in agreement with the Board) that it possessed jurisdiction to consider petitioner's challenge to "the portion of the Board's * * * order that adopted the Administrative Law Judge's finding as to unfair labor practices." *Ibid.*

b. On the merits, the court of appeals enforced the Board's unfair labor practice determinations in an unpublished *per curiam* opinion. Pet. App. 1a-2a. The court held that "[t]he findings of fact relied on by the Board in concluding that [petitioner] violated Section 8(a)(1) of the [Act] * * * are supported by substantial evidence, and the principles of law applied by the Board to those facts are well settled." *Id.* at 2a.

ARGUMENT

1. Petitioner contends (Pet. 8-13) that the court of appeals erred in concluding that it lacked jurisdiction to review the Board's decision to direct a new election. That contention lacks merit and does not warrant review.

a. It is well settled that a party (such as petitioner) that disagrees with a decision of the Board in a representation proceeding generally cannot obtain direct review of that decision in the federal courts. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964). That principle applies to a Board decision to hold a new election in a bargaining unit of employees. See *NLRB* v. *International Bhd. of Elec. Workers*, 308 U.S. 413, 414-415 (1940); *National By-Prods., Inc.* v. *NLRB*, 931 F.2d 445, 448 n.1 (7th Cir. 1991); *NLRB* v. *Carl Weissman & Sons, Inc.*, 849 F.2d 449 (9th Cir. 1988). To obtain judicial review of a Board representation decision, the party seeking review must first commit a pertinent unfair labor practice. *Boire*, 376 U.S. at 477; *AFL* v. *NLRB*, 308 U.S. 401, 409 (1940). In the case of an employer, the pertinent unfair labor practice is a refusal to bargain with the union that has been certified by the Board as the representative of its employees. Upon entry of a final order by the Board in a refusal-to-bargain unfair labor practice proceeding, the aggrieved

employer may then obtain judicial review of the underlying representation decision by filing a petition for review of the Board's final order in a court of appeals. See 29 U.S.C. 159(d), 160(f); *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 139-140 (1971) (employer refuses to bargain with union to obtain judicial review of Board's definition of appropriate bargaining unit); *Boire*, 376 U.S. at 477 (same).

In this case, the Board consolidated a representation proceeding with an unfair labor practice proceeding, entered a final order finding that petitioner had committed unfair labor practices during a union organizing campaign, and directed that a new election be held among petitioner's employees. The Board thus has *not* issued a final order requiring petitioner to bargain with the Union as the representative of its employees. Rather, the final order entered by the Board only requires petitioner to cease and desist from committing specified unfair labor practices (such as engaging in unlawful surveillance of employee union activity) and to post a notice. See Pet. App. 9a, 51a-52a. Whether the Board will issue petitioner a final bargaining order in the future depends on the outcome of the new election directed by the Board.

In such circumstances, the courts of appeals have uniformly held that, although the representation and unfair labor practice proceedings were consolidated at the administrative level, the courts lack jurisdiction to review the Board's decision to direct a new election and possess jurisdiction only to review the Board's final order finding that the employer committed unfair labor practices during the union organizing campaign. See, *e.g.*, *Adtranz ABB Daimler-Benz Transp., Inc.* v. *NLRB*, 253 F.3d 19, 24-25 (D.C. Cir. 2001); *NLRB* v. *Webcor Packaging, Inc.*, 118 F.3d 1115, 1124-1125 (6th

Cir. 1997), cert. denied, 522 U.S. 1108 (1998); *NLRB* v. *Pizza Crust Co.*, 862 F.2d 49, 50 (3d Cir. 1988); *Raley's, Inc.* v. *NLRB*, 725 F.2d 1204, 1205-1206 (9th Cir. 1984) (en banc); *Custom Recovery, Div. of Keystone Res., Inc.* v. *NLRB*, 597 F.2d 1041, 1046 (5th Cir. 1979). As one court of appeals has explained, "[t]he consolidation of the representation and unfair labor practice cases by the Board here cannot * * * confer jurisdiction upon th[e] court to review the orders in the representation proceeding now when no such jurisdiction exists under the governing statute." *Daniel Constr. Co.* v. *NLRB*, 341 F.2d 805, 809 (4th Cir.), cert. denied, 382 U.S. 831 (1965).

Here, the court of appeals properly invoked that uniform line of precedent to hold that it lacked jurisdiction to consider petitioner's "appeal" insofar as petitioner challenged "the Board's direction to conduct a new election" for the employees in petitioner's bargaining unit. Pet. App. 4a (citing *Custom Recovery*, *supra*). The court of appeals' straightforward application of settled jurisdictional principles raises no issue warranting this Court's review.

b. Petitioner contends (Pet. 10-11) that this Court's review is necessary to determine whether a court of appeals would possess jurisdiction to review a decision by the Board to hold a new election if, on review of the Board's final order in an unfair labor practice proceeding, the court were to *reject* the unfair labor practice findings that served as the predicate for the Board's decision to set aside the initial election. That question, however, is not presented by this case. The court of appeals did not reject, but rather *upheld*, the Board's unfair labor practice findings that served as the basis for the Board's decision to set aside the election held among petitioner's employees and to direct a new

election. See Pet. App. 2a. This case thus does not present the hypothetical issue raised by petitioner.[4]

Petitioner also suggests (Pet. 9) that the court of appeals should have exercised jurisdiction over the Board's decision to direct a new election because, by consolidating the representation and unfair labor practice proceedings at the administrative level, the Board has "chosen to treat the two cases as inextricably linked for all purposes," including for the purpose of judicial review. That contention, for which petitioner cites no authority, is flatly contradicted by the uniform line of decisions holding that there is no jurisdiction in the circumstances of this case to review the Board's decision directing a new election. See pp. 7-8, *supra*.

c. Petitioner asserts (Pet. 11-12) that the Board violated Section 10(c) of the Act, 29 U.S.C. 160(c), by reviewing the ALJ's ruling that the Union had lodged election objections only against Service Master, and that the court of appeals condoned that violation when it concluded that it lacked jurisdiction to review the Board's decision in the representation proceeding. Petitioner may obtain judicial review of its claim, however, at such time as the new election ordered by the

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[4] Petitioner relies (Pet. 10-11) on the dissenting opinion in *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d 534, 543-549 (3d Cir. 1983) (Garth, J., dissenting). That dissenting opinion makes clear, however, that the courts of appeals lack jurisdiction to review a Board decision to direct a new election when, as here, "an election has been held, the Board has found the election to be tainted, and the 'taint' (unfair labor practices) found by the Board, *has been upheld* on court review." *Id.* at 545. In that situation, the Board's direction of a new election "can only be reviewed after the company has committed the unfair labor practice of refusing to bargain with a certified bargaining agent." *Id.* at 546.

Board has been held and the Board has ordered petitioner to bargain with the Union.

Petitioner's claim lacks merit in any event. Contrary to petitioner's argument (Pet. 11), the ALJ's ruling did not "automatically" become "the order of the Board" under the "plain language" of Section 10(c). Section 10(c) states that the decision of an ALJ "shall become the order of the Board" only "if no exceptions are filed." Here, the Union filed cross-exceptions to the ALJ's ruling that the Union had lodged election objections only against Service Master. See Pet. App. 5a, 7a-8a; 29 C.F.R. 102.69(f) (proviso); 29 C.F.R. 102.46(e).[5]

Petitioner also suggests (Pet. 13-14) that the court of appeals possessed jurisdiction because the Board's finding in its representation decision that the Union had filed objections against both petitioner and Service Master had the effect of denying petitioner notice and a meaningful opportunity to respond to the Union's allegations, in violation of petitioner's due process rights. Petitioner, however, identifies no authority for an exception to the bar against direct judicial review by a court of appeals of Board representation decisions when the challenging party asserts a due process violation. Petitioner, in any event, was not denied a "meaningful opportunity to prepare its defense" (Pet. 14) at the consolidated hearing before the ALJ. Nothing in the consolidated hearing procedures prejudiced petitioner in the full and fair litigation of its two defenses: (i) that

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[5] 29 C.F.R. 102.69(f) (proviso) states that, when, as here, a representation case has been consolidated "with an unfair labor practice case for purposes of hearing," the filing of exceptions to the ALJ's decision is governed by 29 C.F.R. 102.46(e). That Board rule, in turn, provides that "[a]ny party who has not previously filed exceptions may * * * file cross-exceptions to any portion of the [ALJ's] decision."

the General Counsel's complaint lacked factual and legal merit; and (ii) that the Union had not properly filed election objections against petitioner. See Pet. App. 22a-48a (addressing evidence and argument proffered by petitioner as to both defenses).

2. Petitioner argues (Pet. 14-18) that the court of appeals erred in concluding that substantial record evidence supports the Board's finding that petitioner committed violations of Section 8(a)(1) during the Union's organizing campaign. That fact-bound contention does not warrant this Court's review. As the Court has explained: "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

There is no merit to petitioner's suggestion (Pet. 14) that the brevity of the court of appeals' opinion demonstrates that the court engaged in a "rubber stamp" review of the Board's order with "no substantive rationale for the result reached." The court of appeals enforced the Board's order on the explicit ground that, "[u]pon consideration of the record in the light of the parties' briefs in this case," the court was satisfied that "[t]he findings of fact relied on by the Board in concluding that [petitioner] violated Section 8(a)(1) of the [Act] are supported by substantial evidence" and "the principles of law applied by the Board to those facts are well settled." Pet. App. 2a; see *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) ("courts of appeals should have wide latitude in their decisions of whether or how to write opinions" and that

"is especially true with respect to summary affirmances").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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